(2)

DEC 16 2004

No. 04-708

In the Supreme Court of the United States

MAINE SHIPYARD & MARINE RAILWAY, INC.,
Petitioner,

v.

PNC BANK DELAWARE, a banking institution organized under the laws of the state of Delaware with a place of business in Wilmington, County of New Castle, State of New Jersey,
Respondent

v.

F/V MISS LAURA (O.N. 542762), her engines, machinery, equipment, masts, fishing permits, etc., *in rem*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should consider petitioner's novel argument – never adopted by any court – that a supplier has a maritime lien on a fishing vessel for which he furnished no supplies or services whatsoever, merely because he had a lien on a different boat whose fishing history was used to obtain fishing permits for the vessel in question.

RULE 26.9 STATEMENT

Pursuant to Supreme Court Rule 26.9, Respondent, PNC Bank Delaware, states that it is a wholly owned subsidiary of PNC Financial Services Group, Inc., a publicly traded company. PNC Financial Services Group, Inc. holds a majority interest in Blackrock, Inc., a publicly traded company.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 26.9 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 2

I. This Case Entails No Conflict Among the Circuits 2

II. This Case is Not Sufficiently Important to Warrant Review on Certiorari 5

III. This Case was Correctly Decided 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

B & F Trawlers, Inc. v. United States,
841 F.2d 626 (5th Cir. 1988) 6

Cargill v. M/T Pacific Dawn,
876 F. Supp. 508 (S.D.N.Y. 1995) 7

Central Soya Co., Inc. v. Cox Towing Corp.,
417 F. Supp. 658 (N.D. Miss. 1976) 6

Collins v. The Fort Wayne,
6 F. Cas. 119, (S.D. Ohio 1861) 7

Crotwell v. Hockman-Lewis Ltd.,
734 F.2d 767 (11th Cir. 1984) 7

Gowen, Inc. v. F/V Quality One,
244 F.3d 64 (1st Cir. 2001) 3, 4, 5

Kinsella v. Zim Israel Navigation Co., Ltd.,
513 F.2d 701 (1st Cir. 1975) 7

MariTrend, Inc. v. M/V Sebes,
1997 U.S. Dist. LEXIS 23594 (E.D. La. 1997) . . . 6

Miller v. A/B Svenska Amerika Linien,
454 F.2d 1094 (3d Cir. 1971) 7

PNC Bank Delaware v. F/V Miss Laura,
381 F.3d 183 (3d Cir. 2004) 4

PNC Bank, Delaware v. F/V Miss Laura,
243 F. Supp.2d 175 (D.N.J. 2003) 7

Walsh v. Tadlock,
104 F.2d 131 (9th Cir. 1939),
cert. denied 308 U.S. 584 (1939) 6

West of England Ship Owners Manual Protection & Indemnity Ass'n v. Patriarch Steamship Co.,
491 F. Supp. 539 (D. Mass. 1980) 6

Statutes and Regulations

50 C.F.R. §648.1 1

Treatises and Articles

2 Benedict on Admiralty §66 6

55 C.J.S. Maritime Liens §59 (1998) 7

Comment, Hook, Line and Sinker (and Fishing Permits Too?): The Inclusion of Fishing Permits as Appurtenances to Maritime Liens, 8 Ocean & Coastal L.J. 205 (2003) 4

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In July 1997, petitioner, Maine Shipyard & Marine Railway, Inc. (Maine Shipyard), furnished repair services to the *F/V Miss Penelope*, a commercial fishing vessel owned by David Greenly. On January 28, 1998, the vessel sank and could not be salvaged. The vessel's permits, which were kept on board, went down with the boat.

Greenly submitted an application for confirmation of the vessel's permit history (CPH) to the National Marine Fisheries Service (NMFS) pursuant to federal regulations. *See* 50 C.F.R. §648.4(a)(1)(i).[1] The NMFS issued the CPH on March 26, 1998. Next, on September 11, 1998, Greenly purchased the *F/V Miss Laura*, with financing from respondent, PNC Bank Delaware (PNC). At the same time, Greenly executed and delivered to PNC a preferred ship mortgage on the *F/V Miss Laura*, which granted a continuing security interest in all present and future rights in connection with the ownership and operation of the vessel. He then submitted to the NMFS an application for limited access fishing permits for his new vessel, along with his CPH. The NMFS approved the replacement of the *F/V Miss Penelope* with the *F/V Miss Laura* on July 27, 1999 and issued limited access fishing permits for the latter on July 29, 1999.

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[1] These regulations apply only to domestic fishing in certain fisheries of the Northeastern United States. *See* 50 C.F.R. §648.1.

In 2001, after Greenly defaulted, PNC commenced an action to foreclose on its ship mortgage and to obtain the judicial sale of the *F/V Miss Laura*. Maine Shipyard intervened and for the first time claimed a maritime lien on the *F/V Miss Laura*, based on an alleged outstanding principal balance of $20,349.23 for work performed on the *F/V Miss Penelope*. It is undisputed, however, that at no time, either before or after Greenly's acquisition and mortgage of the vessel, did Maine Shipyard ever provide necessaries or furnish labor or supplies to the *F/V Miss Laura*. Maine Shipyard claimed a lien on the vessel "to the extent of the value of her fishing permits and history" solely by virtue of its theory that these intangibles were transferred from the *F/V Miss Penelope* after she sank. Nevertheless, the permit number for the *F/V Miss Laura's* permit was different from that of the *F/V Miss Penelope*. The most recent set of fishing permits for the *F/V Miss Laura* were issued to that vessel on April 26, 2000, with expiration dates on or before April 30, 2001.

The District Court rejected Maine Shipyard's claim and granted PNC's Motion for Summary Judgment. The Court of Appeals for the Third Circuit unanimously affirmed, albeit on somewhat different grounds.

REASONS FOR DENYING THE PETITION

I. This Case Entails No Conflict Among the Circuits.

Contrary to Maine Shipyard's assertion, the Third Circuit's decision does not conflict with any holding in any other circuit. *No court, anywhere, at any time, has adopted Maine Shipyard's position*. No court has even suggested that a lien claimant has a valid lien on a vessel "to the extent of the value of her fishing permits and history" on the theory

that such permits and history were transferred from another vessel on which the claimant previously had asserted a lien.

Maine Shipyard's reliance on *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64 (1st Cir. 2001) is misplaced. The fact pattern and holding of *Gowen* were markedly different from those in the instant case. Unlike this case, *Gowen* did not involve a sunken vessel. Unlike this case, *Gowen* did not involve a claim that a maritime lien could "jump ship" and attach to a replacement vessel. Moreover, unlike this case, *Gowen* dealt only with a dispute between a lienholder and the vessel owner as to whether an undisputed lien encompassed fishing permits, rather than a dispute between a mortgagee of a vessel and a stranger to the vessel who claimed that its lien on the permits of a separate vessel gave rise to a lien on the mortgaged vessel.

In *Gowen*, the First Circuit confronted an issue of first impression – whether, in the context of a foreclosure sale, a maritime lien on a fishing vessel encompassed the vessel's fishing permits and related fishing history. The court observed that the determination of whether something is an appurtenance subject to a maritime lien is generally made on a case-by-case basis "without great consistency of results" and further noted that the issue was "both novel and difficult." *Gowen*, 244 F.3d at 68, 71. The court concluded that the lien encompassed the vessel's permits. It explained that because the permits reflect the extent to which the fishing vessel is allowed to fish, the "F/V Quality One's permits contributed substantially to the vessel's value ... ." *Id.* at 68. Because such creditworthiness is crucial to the viability of most fishing vessels, the inclusion of the vessel's permits in a maritime lien, according to *Gowen*, would benefit fishermen as much as those who do business with them. *See id.*

Assuming *arguendo* that *Gowen* was correctly decided,[2] it does not follow that a maritime lien extends to another vessel to which fishing permits allegedly have been transferred from the liened vessel. It is one thing to conclude that one who furnishes services to a fishing vessel has a maritime lien that includes the boat's fishing rights; it is quite another to argue that the lien hops from vessel to vessel upon a transfer of permits. The Third Circuit agreed with PNC that nothing in *Gowen* promotes the latter notion. *PNC Bank Delaware v. F/V Miss Laura*, 381 F.3d 183, 185 (3rd Cir. 2004) ("Thus, even if we were to follow *Gowen* and hold that a vessel's fishing permits may be the subject of a maritime lien, we would still need some legal basis for concluding that the lien extends to a replacement vessel once the permits are transferred.")

The Third Circuit sedulously avoided the appearance of a potential conflict with the First Circuit, let alone any actual conflict. The district judge had ruled, in essence, that Maine Shipyard's lien on the *F/V Miss Penelope* and her appurtenances, including any lien on her fishing permits, was extinguished when the vessel sank and could not be salvaged; but the Third Circuit was concerned that a court following the *Gowen* decision *possibly* would disagree, at least in the context of an attempt to foreclose on a sunken vessel's fishing permits *before* the permits become incorporated into a second vessel. *Id.* at 186. Consequently, the court chose to predicate its denial of the appeal on the alternative ground that

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[2] To date, *Gowen* has neither been followed nor explicitly rejected outside the First Circuit. For extensive criticism of the decision, see Comment, *Hook, Line and Sinker(and Fishing Permits Too?): The Inclusion of Fishing Permits as Appurtenances to Maritime Liens*, 8 Ocean & Coastal L.J. 205 (2003).

any lien on the *F/V Miss Penelope's* fishing permits did not attach to the *F/V Miss Laura*. *Id.* at 186-187. This disposition is entirely consistent with the holding and rationale of *Gowen*, which did not address the transfer of fishing permits to another vessel.

This Court need not resolve a conflict which exists only in the mind of Maine Shipyard.

II. This Case is Not Sufficiently Important to Warrant Review on Certiorari.

Although, as discussed *infra*, a ruling in favor of Maine Shipyard could unsettle relations between lenders and fishing boat owners, the significance of the decision below is quite limited. It resolves an issue constituting a rivulet of a minor tributary of the branch of admiralty law concerning maritime liens. The holding will apply only in cases containing all of the following facts:

(a) A claimant had a valid lien on a vessel;

(b) The vessel was a commercial fishing boat;

(c) The vessel was completely destroyed or lost before the lien was satisfied;

(d) At the time of the loss or destruction, the vessel had valid fishing permits from the NMFS;

(e) The vessel owner purchased a replacement vessel;

(f) The owner obtained a CPH; and

(g) The NMFS approved the vessel replacement and issued fishing permits to the replacement vessel based on the CPH.

This is not a situation that is likely to recur frequently. Indeed, it is indicative of the rarity of this confluence of events that Maine Shipyard is unable to cite any other case in which a court confronted this issue. In addition, Maine Shipyard's theory depends on regulations that are not even national in scope, but only regional. This Court need not devote precious judicial resources to a question that might never arise in the future. Moreover, even if the issue were to recur, it is unlikely that any other court would reach a different result, as discussed below.

III. This Case was Correctly Decided.

Maine Shipyard's argument is devoid of merit, for several reasons. PNC outlined eight reasons below, but four should suffice here. First, its theory flies in the face of the established rule that maritime liens cannot survive the vessel's destruction or submergence. *See, e.g., B & F Trawlers, Inc. v. United States*, 841 F.2d 626, 628 n.2 (5th Cir. 1988) (*citing 2 Benedict on Admiralty* §66); *Walsh v. Tadlock*, 104 F.,2d 131, 132 (9th Cir. 1939), *cert. denied*, 308 U.S. 584 (1939); *West of England Ship Owners Mutual Protection & Indemnity Ass'n v. Patriarch Steamship Co.*, 491 F. Supp. 539, 542 (D. Mass. 1980); *Central Soya Co., Inc. v. Cox Towing Corp.*, 417 F. Supp. 658, 664 (N.D. Miss. 1976).

Here, when the *F/V Miss Penelope* "sank and disappeared, it carried its creditors' maritime liens with it to the ocean floor." *MariTrend, Inc. v. M/V Sebes*, 1997 U.S. Dist. LEXIS 23594 *15 (E.D. La. 1997). Moreover, where a vessel is taken to pieces and a portion used in the

construction of another boat, a lien on the first craft will not follow and attach to the new vessel. 55 C.J.S. *Maritime Liens* §59 (1998). *A fortiori*, once a vessel irretrievably submerges and its liens are thereby extinguished, they cannot be resuscitated by the transfer of the vessel's permits.

Second, the limited exception to the foregoing destruction rule applies only to the extent that physical components of the sunken or destroyed vessel are salvaged. *See Collins v. The Fort Wayne* 6 F. Cas. 119, 122 (S.D. Ohio 1861) ("if any part of the vessel is saved, this lien adheres to it, even to the last plank"). As the District Court below noted, the process for obtaining a confirmation of a vessel's permit history does not in any sense constitute the "salvage" of a vessel (App. 9-10). *PNC Bank, Delaware v. F/V Miss Laura*, 243 F. Supp.2d 175, 178 (D.N.J. 2003); *see Cargill v. M/T Pacific Dawn*, 876 F. Supp. 508, 511 (S.D.N.Y. 1995) (defining salvage).

Third, Maine Shipyard cites no cases (and PNC is aware of none) holding that a lien on a sunken vessel may extend to an appurtenance that has been transferred, after the submersion, to a second vessel. The general rule in maritime law is that once an item is separated from a vessel, it is no longer regarded as an appurtenance. *See, e.g., Crotwell v. Hockman-Lewis Ltd.*, 734 F.2d 767, 768-69 (11th Cir. 1984); *Kinsella v. Zim Israel Navigation Co., Ltd.*, 513 F.2d 701 (1st Cir. 1975); *Miller v. A/B Svenska Amerika Linien*, 454 F.2d 1094 (3d Cir. 1971).

Finally, Maine Shipyard's position contravenes public policy. To date, those providing services or loans to a fishing vessel simply had to make calculations about the creditworthiness of that particular vessel. If Maine Shipyard's arguments were to prevail, it would throw all

transactions with fishing vessels into a state of uncertainty. In addition to assessing creditworthiness, potential creditors would have to research the fishing permits of that vessel, determine whether the permit history of another vessel or vessels had been utilized, and then (if possible) examine the credit history of those other vessels. It is not known what such a change would mean for all of the existing liens on fishing vessels or what it would portend for the future of the fishing industry. The Court should decline the invitation to steer a risky and uncharted course in the choppy waters of maritime lien law.

As its opinion shows, the Third Circuit thoroughly considered Maine Shipyard's novel argument and properly rejected it. There is no need for further review.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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